United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7273

To be argued by
RICHARD E. SHANDELL

United States Court of Appeals

FOR THE SECOND CIRCUIT

FELIX MERCED and MODESTA MERCED,

Plaintiffs-Appellants,

—against—

AUTO PAK COMPANY, INC.,

Defendant-Appellee,

S & C LIQUIDATING CORP., AUTO PAK DIVISION OF FLINCHBOUGH PRODUCTS, DIVISION OF GULF & WESTERN SYSTEMS CO., ALBERT SHAYNE and ARTHUR CONTENT,

Defendants.

AUTO PAK COMPANY, INC.,

Third-Party Plaintiff,

—against—

SOUTHBRIDGE TOWERS, INC.,

Third-Party Defendant.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

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Issues Presented

1. Was defendant's garbage compactor machine which, though designed to be automatic, required the operator to expose himself to danger, by poking at jammed-up garbage

with a stick in order to make the machine operate, defective within the meaning of New York law?

2. Were questions with regard to whether the defect involved was "patent" or "latent", questions for the determination of the jury and did the court err by setting aside the jury's determination in favor of the plaintiff?

3. Was the question of plaintiff's contributory negligence a question of fact properly left to the jury and did the court err by setting aside a jury determination in favor of the plaintiff on this point?

4. May the defendant's liability also be based on its failure to give adequate instructions as for use or to warn of the dangers involved in the machine?

5. Was the question as to whether or not the defect in the machine was a proximate cause of plaintiff's accident a question of fact for the jury and did the trial court err by setting aside the jury's determination in plaintiff's favor on this point?

6. Did the trial court err when it deemed abandoned the cause of action of plaintiff, Modesta Merced?

Statement of the Case

This is an action for personal injuries brought by the plaintiff, Felix Merced and a derivative action for loss of consortium brought by his wife, Modesta Merced, against the defendant Auto Pak Co., Inc., a manufacturer of chute fed garbage compactors and other defendants. The complaint was filed on April 12, 1973.

A third party complaint for indemnity and contribution was issued against defendant, Southbridge Towers, Inc., the employer of the plaintiff and filed on September 11, 1973. Additional third party complaints were issued

against defendant, Universal Commercial Industries and Chutes Associates, also for indemnity and contribution.

The cause came on for trial before Judge Harold Tyler and a jury, to be tried on liability issue only, commencing February 3, 1975. The court dismissed plaintiff's action against all of the defendants, other than Appellee Auto Pak Co., Inc. The jury returned a verdict in favor of plaintiff and against Auto Pak. By agreement the issues on the third party complaints were to be decided by the trial judge as trier of the fact. The trial judge dismissed all third party complaints, except the third party complaint by Auto Pak against Southbridge Towers. On that third party complaint the court ruled that under the contribution theory as enunciated in *Dole* v. *Dow Chemical Co.* Southbridge Towers was liable for contribution of 40% of any damages assessed against Auto Pak in favor of the plaintiff. The jury was excused with the intention of trying out the issue of damages later before a separate jury. The court thereafter granted the motion of defendant, Auto Pak, to dismiss and for judgment n.o.v. in a decision filed March 25, 1975 and accordingly dismissed also the third party claim over. A judgment directing judgment in favor of the defendant and third party plaintiff, Auto Pak, notwithstanding the verdict, and in favor of the third party defendant, Southbridge Towers, dismissing the third party complaint, was filed on April 22, 1975.

The plaintiffs appeal from that judgment.

The Relevant Facts

On July 13, 1972 plaintiff lost his right arm (471a) in an accident while working at a garbage compactor machine purchased by Southbridge Towers, Inc., his employer, from defendant, Auto Pak Company, Inc. of

Bladensburg, Maryland (46a) (hereinafter "Autopak") and installed by third-party defendant, Universal Thermal. The garbage compactor was a chute-fed compactor designed so that it could fit at the bottom of a garbage chute in an apartment building. Refuse could then be disposed of down the chute. Then the refuse, instead of being burned in an incinerator and carried away as ash, would be compacted. The machine was designed to be operated automatically. The service manual for the machine stated as follows:

> "The Gobbler is a unique system of trash compaction. It is specifically designed for use when large volumes of refuse must be compactly *and automatically* stored for later removal from the premises." (682)

> "This hopper is a large hydraulically operated horizontal ram. Several inches above the ram a light beam passes horizontally across the unit into an externally positioned photocell. *The packing operation is completely automatic* and is initiated as soon as enough trash accumulates to block the light beam for five seconds. The ram actuating mechanism begins its cycle retracking the ram. Trash then falls from the hopper into the space ahead of the ram and is forced out into a chamber where it is compacted. It is then extruded through a sizing tube and gradually transferred into a bag or can. If all the trash is forced out in this cycle, the light beam will no longer be blocked and the ram will stop in the extended position. If, however, more trash remains to block the light beam for another five seconds, the cycle will be repeated. The cycle will continue as long as the light beam is blocked for a continuous five second interval." (683a) (emphasis supplied)

Plaintiff's employer, Southbridge Towers, bought this machine with the understanding that the machine would run 24 hours a day, automatically turning itself on and off through the electric eye (51a). Harry Nelson, the general manager for Southbridge Towers, testified that it was his understanding that the porters who maintained the building could go about their business maintaining the floors, maintaining compactor chutes on each floor and doing other work all the while the compactor was running, working its way automatically through the garbage (53a).

That, however, is not how the compactor actually ran in practice for had that been the case there would have been no occasion for the plaintiff's arm to have been caught in it. In practice, what occurred according to the testimony of Mike Herman, superintendent for Southbridge Towers (73a), although the Auto Pak people told them that they should leave it on, they turned it on just in the morning, the afternoon and the evening (78a), because it was his experience that if the garbage did not fall down the machine would not operate and if the porter was not there to make sure the garbage fell down the machine would not operate (79a). That is why Mr. Herman decided to run the machine only when a porter was around (79a). Porters were required to remain in the room the entire time the compactor was running and if they had to go out for any reason whatsoever they were required to turn off the machine (620a). This was testified to by Louis Rivera, a witness called by defendant, Auto Pak. Porters were issued sticks in connection with their operation of the electric eye. A facsimile of one of these sticks was admitted into evidence as plaintiff's Exhibit 3 (59a). The purpose of the sticks was to push the garbage and start it falling down from the chute to the piston (80a). The porters were instructed to use the sticks if the garbage did not fall down, to push with

the sticks and loosen the garbage, thus causing it to fall down to the piston. The piston (Mr. Herman's word for the ram) was at the bottom of the machine and the garbage did not fall all the way down to it. It stuck (81a). The garbage (as the Trial Court's questioning so clearly brought out) frequently stuck within the machine itself (82a). Blockages and jam-ups occurred in all compactors from time to time, caused by bridging or just by a big object being thrown in or by other causes (156a). Bridging is a common term used in the trade describing a condition that when trash falls in a position to form an arc or a bridge over the compacting chamber, the rest of the trash falls on top of it, can't come down because it's supported by this bridge (157a). Mr. Jordan Danziger, secretary of Universal Thermal Corporation, the installer of the compactor in question (146a to 147a) was familiar with the problem. He knew that people who had this problem with Auto Pak compactors devised various ways to deal with it. Some take a poker, some sort of stick or an iron rod and reach into the compactor hopper and hit the refuse. This causes the material to fall down and it breaks the bridge (158a). Moreover, Mr. Danziger decided that Auto Pak was quite aware of the problem all the time and knew that people who were using this compactor were experiencing bridging problems which required them sometimes to open the hopper door and hit the garbage with a stick or poker (158a). No hint of these problems were ever put in the instruction book (193a) Danziger's excuse for this was "The manufacturer wouldn't print the faults of the machine" (194a).

Danziger testified that Mr. Clar, Vice President of Auto Pak (503a), had communciated his awareness of this problem to him but no instructions on what to do about it (158a, 159a). Clar, who designed the compactor, was not an engineer of any kind (222a-223a). Clar had had some machinist experience in a Navy yard, had then

done some drafting work for a firm that manufactured riveting guns, had gravitated into designing hydraulic riveting machines for that firm (224a-226a). He went to work designing hydraulically operated lifting mechanisms for Shayne Brothers, refuse carters, in Washington, D. C. (230a-231a). When he got the idea for the chute fed waste compactor, he designed and built it with Shayne Brothers money (236a-237a). At his deposition read at the trial, Clar denied the existence of the problem (307a) testified to by Danziger and of which Danziger testified Clar was aware. Clar knew very little about how this machine would work in practice. He could not say what was the volume of garbage coming down the chutes of the apartment buildings at which he tested the product, (241a) other than it averaged out at something like twelve cubic yards a day (244a). Although he testified that he ran tests on these machines and made records of these tests (248a), no records ever were found (249a-253a). In any event, the designer could not say how much garbage the machine was disposing of in the course of an hour or in the course of a cycle (292a). He never tested out what would happen if pieces of wood were dropped down the chute (301a) or bottles (301a) or a big carton (302a). He never tested what would happen if the machine was allowed to remain for any part of the day and garbage allowed to stack up in the chute (306a, 307a), although he heard that what would happen would be that everything that would be in the hopper would feed into the machine and extrude into the bags (307a).

With all of these problems, Mr. Herman at Southbridge found it was better if the porter stayed there and watched the machine while it was operating (96a). As a result, the porter had to come in the morning, in the afternoon after lunch and in the evening and turn the machine on. When the machine was turned on at eight in the morning it had not been on since sometime the night before (97a), and people had a chance to throw

garbage down the chute during that time. Sometimes the garbage built up as high as the first floor (97a). This build-up of garbage in the chute would cause bridging problems to be more likely to occur (159a).

Between the chute and the hopper there is a deflection plate and the garbage comes down through the chute and the deflection plate acts like a ramp so that the garbage slides down the ramp and fills the area above the ramp (354a). The means of the transfer of the garbage from the chute to the ramp was just gravity (355a), since the deflection plate is at an angle that reduces the force of gravity because a horizontal component is now introduced (355a). The engineering effect of this is that garbage will tend to compress and pile up due to the fact that more garbage comes down. You very easily get one or two bags sort of wedged in and this builds something almost like a bridge (356a). This offset offers more resistance to the trash and there is more probability of building up. The best place to have the ramp, of course, is not offset the way it was in this installation but directly under the chute (171a).

Of course, if garbage stacks up in addition to compressing down on the garbage below, it will not only be compressed but it would squash it to the side and lateral forces will be created that will tend to push the bags outside against the wall of the machine as the garbage is being compressed (662a-663a).

The result was that when the porters came to turn the machine on they would have to help it out with their sticks by pushing the garbage with the hopper door open (663a), and that is the way they worked until the garbage was disposed of (264a). Even when a piece of garbage would become unstuck, the next piece of garbage could fall through and just create another jam (751a). The porters had only two hours to clear away the gar-

bage in the morning (751a), and if he had to get all of that garbage disposed of in an hour and a half a porter could not turn off the switch each time he tried to unstick a piece of garbage because if he did that he could not get his job done in five hours as Secundo Diaz, the last witness, was forced to admit (752a).

Not only was this machine defective in that although designed and intended to be automatic, it in reality required an attendant to stand by it and stoke it (with a stick). It also was not, though sold as a compactor, in reality a compactor at all. The garbage was pushed by the ram into an extruding section and out into a plastic bag (644a). A little bit of compacting takes place as the garbage is extruded into the bag but the process is not a compaction process at all but merely an extrusion process. A compactor would reduce the volume of material to a smaller size. This unit accomplishes some reduction in size but what it does is to take the material that comes into the hopper from the chute and transfer it into a plastic garbage bag, without any significant compaction (350). The machine is equipped with plastic bags that come in a continuous tube. The tube can extend as the garbage fills it up to the length of the room (351a), as long as you have enough of the tube available. The garbage is pushed through the snout at the end of the machine and into these plastic bags (352a). If there was anything other than a small compaction effect the pressure of that compaction effect would burst the bags (350a). Things like pieces of glass would burst the bags (95a). As a result, Superintendent Herman gave his porters instructions to watch the bags. Wood or a bottle or anything with a jagged edge could burst the bags (353a). Carpet or wood might jam the machine (353a, 354a).

According to the testimony of Professor Herbert Aaronson, who testified as an expert in mechanical engi-

neering on behalf of the plaintiff, the design of the machine was improper in that there should have been a direct feed so that the garbage would keep coming down. If the chute had been in the center that would have had a tendency to break up the bridging effect but otherwise what was required was some kind of mechanical positive feed to this device (359a). This could be done by having a screw that would break up the bridging, and carry the garbage along or there could be a vibrating device or rotating bars or one of many other mechanical means to break up the tendency of the garbage to clog (358a). In the absence of such device, the design of this machine was improper according to engineering principles (358a, 359a). Since the machine was not automatic but required manual assistance (359a, 360a), good and accepted engineering practice required the installation of an interlock, a device such as is present in elevators or automobiles, that prevents an elevator from moving until the doors are closed or an automobile from moving until the seat belts are connected. Such a device was required on the hopper door to this machine so that each time the door was opened to put a stick in to break up the garbage the machine would automatically be turned off (370a, 371a).

On behalf of the defense, Mr. Irving Deutsch testified that according to standards in the industry in 1970, interlocks on a hopper door such as that involved in this particular compactor were not required (650a). Mr. Deutsch further testified that this particular machine was designed in accordance with good practice, was well guarded and complied with all the guarding required under Industrial Code 19 and the U. L. Code (652a). He gave as the reason for his opinion:

> "The normal operation of this machine required that the doors be closed and that the—there is no reason for anyone doing anything but operating—and this goes to the operator—there is nothing

> the operator has to do inside that machine. All his operators have to do with external parts, namely, the control panel and filling the oil. The instructions require the man to do only those things which are external to the compactor, hopper and compacting chamber. There is nothing that he has to do or is required to do. As a matter of fact, quite the contrary. He is told not to do anything inside that compaction chamber."

Although Mr. Deutsch insisted that safety did not require that this machine be equipped with an interlock device and stated that he had never seen such a requirement, on cross examination it was developed that Section 5 of the National Sanitation Foundation's standards for safety stated as follows:

> Section 5.1
>
> "Compactors shall be so designed and constructed as to protect against inadvertent entrapment of an individual or his extremities in any moving mechanism. The refuse compacting zone shall be totally closed with an interlocking door, panel or closure or shall be otherwise adequately protected against entrapment of the person's extremities."

Of course, the essence of Mr. Deutsch's opinion with regard to the safety of this machine, as set forth at pages 698a and 699a is that the workers do not have to stand in front of the hopper door and do not have to break up blockages. Mr. Deutsch was forced to admit that if this machine in use worked so that if a porter was not there to make sure that the garbage did fall down to the electric eye; then the machine would not operate. That under those circumstances the customer "*should get your money back on the machine*" [emphasis supplied] (692a-693).

To top it all off, a workman standing with his stick trying to break up garbage at the open hopper door was subject to getting hit with a piece of garbage that bounced off the deflection plate (101a). Although Herman tried to pretend that there was a safety door to close to prevent garbage coming down the chute like that (101a), actually it was a fire door with a heavy spring that was very difficult to close (265a). This fire damper operated on springs and operated automatically when the temperature caused bolts to explode or melt (371a-372a). The end result of the employer attempting to live with this machine instead of getting their money back and installing a different machine was that on July 13, 1972, when Felix Merced was trying to work this machine at ten in the morning (471a) when he grabbed the stick in his hands and started to push the garbage that was jammed, he came across a big piece of wood which had come down and "stuck the machine". He reached in with his hand to take out the piece of wood and a bottle came down the garbage chute and struck him in the head. A bunch of garbage came down then into his hand and while he was dazed, the machine grabbed his hand, (472a) and he lost his right arm (471a). The piece of wood involved was not lying inside the ram cylinder or anything like that but was lying on the ramp or sliding plate (472a).

POINT I

Defendant's compactor machine was defective within the meaning of New York law.

The jury, when posed the question whether this machine was defective and unfit to be used for its intended purpose, answered in the affirmative (16a).

The Trial Court set the verdict aside and held as a matter of law that it was not, on the grounds apparently

that the defect in question was not "latent" within the meaning of the rule enunciated in *Campo* v. *Scofield,* 301 NY 468. The Trial Court plainly erred. The rule in *Campo* v. *Scofield, supra* does not apply to the case at bar. In the case at bar, we deal with a machine that was supposed to be automatic. The service manual, which was the only instruction issued with the machine, stated specifically that the machine is automatic. Nelson, the general manager of the Southbridge Towers, testified that it was his understanding that a porter could go about whatever cleaning he had and that the compactor would work its way automatically through the garbage 24 hours a day. This was not true. Mike Herman, the superintendent of Southbridge Towers, testified that if a porter was not there to make sure that the garbage would fall down to the electric eye, the machine would not operate. That is why they decided that they could only run the machine when a porter was around and issued sticks to unblock garbage. Although this was a matter of dispute at the trial, Merced and Melendez, his fellow worker, both testified that they had to stand there and continually break up jams with these sticks. The result was that Southbridge Towers, because they did not want to have a porter standing there with a stick in three shifts, 24 hours a day, in case a piece of garbage came down, began to turn the compactor on and off.

This only made things worse. It is clear that the better practice would be to leave this machine on as Danziger from Universal Thermal testified and that would eliminate, according to Danziger, most of the problem. Professor Aaronson, on behalf of the plaintiff, testified that while that would eliminate some of the problem it would not eliminate all of it (452a). The reason the machine was subject to jam-ups and bridging was obvious. The machine had a sort of elbow effect with the force of gravity inherent in garbage being thrown down the

chute. It was cut down by creating an angle plate. The testimony of Professor Aaronson, which went uncontradicted on this point, was that commonly accepted engineering principles required some sort of positive feed, using rollers or screws or something to move the garbage along, if you wanted the machine to be automatic. Otherwise, it would jam. On top of that, the machine which was supposed to be a compactor, wasn't a compactor at all. It merely transferred garbage through an extrusion snout into a bag. The result would be that if a piece of wood, a bag of bottles or a paint can got caught into the machine the machine would hit it and back off, hit it and back off, creating even more back-ups and jam-ups above that point as garbage piled above this point. The jury was entitled to conclude from the evidence that this machine which was supposed to be automatic, was not automatic at all but required continuous or at least frequent stoking with a stick to move the garbage along. Although defendant's expert denied that the machine worked in this way, there was an overwhelming amount of evidence to support this conclusion. Defendant's expert, when asked to assume that the machine worked in the manner described by Mike Herman that if a porter was not around to make sure that the garbage would fall down to the electric eye then the machine would not operate, testified that if that's the way the machine worked then they should have gotten their money back. Here, from the defendant's own engineering expert, comes the essence of warranty liability. The jury concluded that the machine was defective, unfit to be used for its intended purpose. The trial court brushed all that aside saying that "under New York law the manufacturer was under no legal duty to design the compactor to incorporate such safety and efficiency features." See *Campo* v. *Scofield, supra; Bolm* v. *Triumph Corp.*, 33 N.Y.2d 151, 156-159 (1973).

But *Campo* v. *Scofield, supra,* was far, far different than the case at bar. The machine in *Campo* v. *Scofield, supra,* was an onion topping machine. The machine itself ran precisely the way it was supposed to run and functioned properly for the purpose for which it was designed. That is not the situation in the case at bar.

The Court pointed out in *Campo* v. *Scofield, supra*:

> "if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demand. We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or foolproof. . . .*To illustrate, the manufacturer who makes, properly and free of defects, an axe or a buzz saw or an airplane with an exposed propeller,* is not to be held liable if one using the axe or the buzz saw is cut by it, or if some one working around the airplane comes in contact with the propeller. In such cases the manufacturer has the right to expect that such persons will do everything necessary to avoid such contact, for the very nature of the article gives notice of the consequences to be expected. . . ." [Emphasis supplied]

The case at bar is very different from the case described by the Court in *Campo* v. *Scofield, supra;* here we do not have an axe or a buzz saw or an airplane propeller, functioning properly as an axe, buzz saw or an airplane propeller. In the case as bar we have a machine that never worked the way it was supposed to. All that was held in *Campo* v. *Scofield,* supra, was that there is no duty on the part of the manufacturer to provide a machine with "all possible protective guards and other safety devices". *Campo* v. *Scofield, op. cit.* supra at p.

474. This is because the Court believed that when dealing with such things as propeller blades, buzz saws or other cutting or grinding devices, dangerous because of their normal operation, there would be no duty owed by a manufacturer to "guard against injuries resulting from the user's own patently careless and improvident conduct". *Campo* v. *Scofield, op. cit. supra,* at page 475. All that *Campo* v. *Scofield, supra* stands for, notwithstanding broader dicta about concealed dangers and open and obvious conditions, is that there is no duty on the part of a manufacturer to place a guard over the moving parts of a machine that functions as intended.

Even limited in that way the case has been much criticized. Harper and James were among the early writers to mount an attack. They said:

> "The bottom does not logically drop out of a negligence case against the maker when it is shown that the purchaser knew of the dangerous condition. Thus if the product is a carrot-topping machine with exposed moving parts, or an electric clothes wringer dangerous to the limbs of the operator, and if it would be feasible for the maker of the product to install a guard or safety release, it should be a question for the jury whether reasonable care demanded such a precaution, though its absence is obvious. Surely reasonable men might find here a great danger, even to one who knew the condition; and since it was so readily avoidable they might find the maker negligent. Under this analysis the obviousness justifies the conclusion that the condition is not unreasonably dangerous; otherwise it would simply be a factor to consider on the issue of negligence."

Harper & James, Law of Torts, Section 28.5, page 1543. In *Finnegan* v. *Havir Mfr. Corp.,* 290 A.2d 286, the New Jersey Court of Appeals said:

> "Where a manufacturer places into the channels of trade a finished product which can be put to use and which should be provided with safety devices because without such it creates an unreasonable risk of harm, and where such safety devices can feasibly be installed by the manufacturer, the fact that he expects that someone else will install such devices should not immunize him. The public interest in assuring that safety devices are installed demands more from the manufacturer than to permit him to leave such a critical phase of his manufacturing process to the haphazard conduct of the ultimate purchaser. The only way to be certain that such devices will be installed on all machines —which clearly the public interest requires—is to place the duty on the manufacturer where it is feasible for him to do so."

> "We think this case presents a situation where the interests of justice dictate that contributory negligence be unavailable as a defense to either the negligence or the strict liability claims. The asserted negligence of plaintiff—placing his hand under the ram while at the same time depressing the foot pedal—was the very eventuality the safety devices were designed to guard against it. It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against."

The Restatement of Torts, Section 402(a), has rejected this concept. This Court, in *Wheeler* v. *Standard Tool and Mfg. Co.*, 497 F.2d 897 (1974) said:

> "After a careful review of the evidence, including an evaluation of the evidence for credibility, Judge Duffy found that the absence of a guard at the needle inserting station was a 'defective condition

> unreasonably dangerous to the user' within the meaning of §402A. We hold that this finding was supported by substantial evidence and was not clearly erroneous."

We refer to this criticism not to suggest that this Court can do other than follow New York law but to highlight the injustice done to a horribly maimed workman when the trial court stretches the meaning of an old and much criticized case to create immunities from responsibility never contemplated.

No New York case has ever immunized from liability a manufacturer whose machine did not work in the manner intended. As we have pointed out, *Campo* v. *Scofield, supra* itself, and all the illustrations set forth therein, involved machines that worked exactly as intended lacking but a guard to prevent the hands of a workman from coming into contact with the moving parts. The rule set forth in the *Campo* case was specifically put on that ground.

Following *Campo* v. *Scofield, supra,* although talk of concealed dangers continued to dominate the language of the decisions, no plaintiff in New York has ever been turned out of Court in a case where the machine malfunctioned even when the malfunctioning was open and obvious. In *Inman* v. *Binghamton Housing Authority,* 3 N.Y.2d 137, all that was involved was a handrail not built along the side of a terrace. In *La Rocca* v. *Farrington,* 301 NY 247, a link and chain broke because of a fracture crack which was present for two years and there for all to see, the New York Court of Appeals upheld the liability of the supplier, over the dissent of Judge Desmond and Fuld, pointing out that the condition was as readily discoverable by plaintiff as defendant, indeed more so, because it was plaintiff who had been handling the chain for two years, not defendant.

In *Lusardi* v. *Regency Joint Venture,* 35 App.Div.2d 264, a scaffold fell. The scaffold lacked lateral bracing as anybody who would have looked at it would have seen. The Court, rationalizing that though the defect might be obvious the danger was not, held that a prima facie case of liability had been made out.

In *Lyons* v. *Durand Machinery Inc.,* 39 App.Div.2d 1011 (1972), the Court refused to dismiss a case in which the plaintiff was attempting to move apples along a conveyor belt as they came out of an oven. The Court said:

> "Defendants contend that plaintiff wife on this record was guilty of contributory negligence as a matter of law. They rely largely on *Walk* v. *Case Co.* (36 A.D.2d 60). The *Walk* case is readly distinguishable. There the Court granted a motion to dismiss the complaint at the close of plaintiff's case, whereas here we are dealing with a motion for summary judgment. Furthermore, in the *Walk* case the defect which caused the plaintiff's injury was patent, and there was a warning plate on the machine cautioning that it should be shut off before attempting to correct the difficulty. The plaintiff chose to clean the machine while it was in operation. In the instant case plaintiff wife was attempting to move apples along a conveyor belt as they came out of an oven. While she was engaged in this activity her finger was injured. The record reveals that it is the contention of the plaintiffs that the machine contained a latent defect, and it was not marked with a warning sign to advise its users of possible danger. Plaintiffs propose to produce expert testimony to show that there should have been a 'plush point' guard and a warning. Questions of fact are presented which should be determined only after a trial."

The jury, in the case at bar, found in response to specific interrogatories and there was evidence in the record to support these findings, that the machine was defective in design because "a mechanical device to avoid 'bridging' was not incorporated in the design; therefore, machine could not function as 'automatic' but required frequent manual assistance. Also, no protection was afforded from objects ricocheting from deflection plate when hopper door was open." (17a)

There is no authority in New York law to reject these findings since they go far beyond the failure to provide guards for a machine that otherwise functioned as intended. The New York Courts, rather than extend the reach of *Campo* v. *Scofield,* supra beyond the area of immunizing manufacturers from a common law duty to put guards around open machine works, would most likely restrict the applicability of that case. As the New York Court of Appeals said in the *Bolm* case, *supra,* 33 N.Y.2d 151:

> "We perceive of no sound reason, either in logic or experience, nor any command in precedent, why the manufacturer should not be held to a reasonable duty of care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents."

The Court further said in *Bolm,* supra:

> "As was pointed out in *Codling,* liability for defective products has, over the years, been increasingly shifted to the responsible manufacturer in order 'to avoid injustice and for the protection of the public'."

In *Myer* v. *Gehl,* 36 N.Y.2d 760, the court in affirming the dismissal of the complaint involving the injury of a

child when his hand became caught in moving machinery at the rear of a hay unloader wagon, wherein the sole allegation on which liability must be predicated is the failure to equip this wagon with safety devices to shield the moving parts or to stop them in the event of contacting a foreign object. The Court, with ample opportunity to reaffirm *Campo* v. *Scofield, supra,* placed its decision on the much narrower ground that there is no duty on the part of a manufacturer to foresee that a child of tender years would have been present in and endangered by this farm machinery.

Controlling in the case at bar is the New York case of *Beckhusen* v. *E. P. Lawson Co.,* 9 N.Y.2d 726, reversing 9 A.D.2d 536. In *Beckhusen,* the paper cutting machine was designed to perform a single cycle operation after a batch of paper was placed on the platform of the device, a guillontine-type paper-cutting knife descended and sliced through the paper and then returned to safety position and stopped. The operator was required to manipulate two levers situated below the platform in order to operate the knife. Both hands were, therefore, required and neither could come into contact with the knife. At approximately hip level there were two access doors or plates which were intended to be opened only for inspection, maintenance and replacement of parts. On the day of the accident, the left access door opened, causing the left hand lever to spring back while being manipulated by the plaintiff, interfered with the braking mechanism and prevented it from functioning properly. The plaintiff then put his hand on the platform to remove the paper, the knife descended and severed the fingers of his hand.

The Appellate Division dismissed the complaint citing *Campo* v. *Scofield, supra,* stating:

> "the record disclosed that the plaintiff testified that he knew that the left-hand door was not to be opened. The use of a screw bolt to keep the doors fastened to the face of the machine sufficiently indicates that they were not intended, in the exercise of ordinary care, to be left open."

The Court of Appeals reversed. The Court, in reversing, held:

> "We are of the opinion that the jury had the right to find that defendant's design of the guillontine-type paper-cutting machine in such a manner as to permit the access doors to interfere with the safety mechanism, without at least warning the operator of the hazard foreseeable by it, was negligence, and that the negligent design of this dangerous instrumentality was the proximate cause of plaintiff's injury. It was, therefore, unnecessary for plaintiff to show precisely how or why the door opened."

In the case at bar, as in *Beckhusen* v. *E. P. Lawson,* supra, we have a machine that created unexpected difficulties in its operation, exposing the plaintiff not to dangers patent on visual observation of the machine but to dangers that arose from the poor and improper functioning of the machine. The buyer of the machine was not made aware that this machine required to be attended and thus might need additional guards. It was the improper functioning of the machine that made it necessary to have an attendant. Nor was it apparent that objects might fly out at you while you attempted to assist this supposedly automatic machine in it operation. These are not patent defects.

POINT II

The Trial Court erred in removing from the jury's consideration and deciding as a matter of law questions as to whether the dangers involved were "patent" or "latent" and whether the plaintiff was guilty of contributory negligence barring recovery.

Although there is no warrant in New York law for immunizing a manufacturer from the obligation and responsibility to produce a product that runs in the manner intended and with reasonable safety, there is no question but that under New York law contributory negligence is a defense to a products liability suit and as the Court of Appeals stated in *Codling* v. *Paglia,* 32 N.Y.2d 330 and reiterated in *Bolm, supra,* liability will be imposed only if the person injured "would not by the exercise of reasonable care have both discovered the defect and perceived its danger."

Thi question, involving as it does the range of reasonable anticipation and apprehension, is peculiarily a question of fact to be decided by a jury.

In *Bolm* v. *Triumph Corporation, supra,* the defect claimed was that in the placement of a parcel grid on top of a gas tank in front of the saddle of a motorcycle was dangerous, resulting in a so-called second accident which following a collision would result in a greater injury to the driver of the motorcycle from contact with the luggage rack. It is hard to see how anything can be more open and obvious than the location of this luggage rack. As Judge Jones pointed out in his dissenting opinion in the Court of Appeals when he said:

> "I would conclude, as a matter of law, that plaintiff user of the motorcycle by the exercise of rea-

> sonable care would have both discovered the defective design of the metal luggage rack (perilously positioned as it was, directly in front of him and between his legs as he rode) and as well inescapably have perceived the danger incident to its design and location."

Nevertheless, the Court of Appeals affirmed over Judge Jones' dissent, holding that the question of the patency of the defect and its discoverability was one for the jury. The Court said:

> "As mentioned above, we qualify our affirmance with a notation that the issue as to the latency or patency of the dangers from the design defect—presents a question of fact which should not have been resolved by the Appellate Division on appeal from the motion for summary judgment. As chief Judge Cardozo stated in *Palsgraf* v. *Long Is. R.R. Co.* (248 N.Y. 339, 345), 'The range or reasonable apprehension is at times a question for the court, and at time, if varying inferences are possible, a question for the jury.' Here the duty and, thus, the liability of the manufacturer turn upon the perception of the reasonable user of the motorcycle as to the dangers which inhere in the placement of the parcel grid on top of the gas tank. That is a question of fact which should be submitted, with the other issues, for jury consideration."

It is clear that in the *Bolm* case, supra, the Court of Appeals was attempting to ease the harshness of the *Campo* v. *Scofield* rule even as it applied to a product which worked exactly as intended by making it clear that questions involving perceived danger are questions for the jury. The decision is in keeping with all the current

trends of New York law. *Rossman* v. *La Grega,* 28 N.Y. 2d 300; *Wartels* v. *County Asphalt, Inc.,* 29 N.Y.S.2d 372. As the Court said in *Wartels* v. *County Asphalt, Inc.,* supra:

> "First of all, the determination of the issue of contributory negligence is, of course, almost exclusively a jury function. 'Indeed, the general softening of the rigidities of the doctrine of contributory negligence in New York may be seen in recent cases where the injured person is himself suing and thus has the burden of showing he was not negligent. The tendency is to treat it almost always as a question of fact."

Virtually on all fours, with the case at bar, is *O'Connell* v. *Westinghouse X-ray Co.,* 288 NY 486, reversing 261 App.Div. 8. The *O'Connell* v. *Westinghouse X-ray Co.* case, *supra,* was one of the cases relied on by the New York Court of Appeals in *Campo* v. *Scofield, supra,* and cited to the proposition that there is liability "only if the defect or danger be not 'known' or 'patent' or 'discoverable by a reasonable inspection'." In *O'Connell* v. *Westinghouse X-ray Co., supra,* the plaintiff, an experienced surgeon, received burns while performing operations on patients under the beam projected by an X-ray machine manufactured by the defendant. In the Appellate Division the Court held that the finding of negligence on the part of the defendant is against the weight of the credible evidence, holding that there was no obligation to place a guard to keep the plaintiff from placing his hands under the beam and also that the plaintiff, in exposing his hands to the X-ray was, since he was a medical doctor presumably having knowledge of the dangerous effects of X-ray, guilty of contributory negligence as a

matter of law. 261 App. Div. 8. The Court of Appeals reversed, saying:

> "Judgments reversed and a new trial granted with costs to abide the event upon the ground that questions of fact were presented for the determination of the jury in regard both to defendant's negligence and plaintiff's freedom from contributory negligence.
>
> All concur."

But even if New York law did not require the submission of the question to the jury of whether the plaintiff should reasonably have perceived the dangers involved in doing what he was doing, federal law would so require. In removing this question from the jury and deciding it as a matter of law the Trial Court violated the plaintiff's rights under the Seventh Amendment to the United States Constitution. *Byrd* v. *Blue Ridge Cooperative,* 356 U.S. 525; *A & G Stevedores* v. *Ellerman Lines,* 369 U.S. 355. In *Byrd, supra,* the Court said:

> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. (Jacob v. New York, 315 U.S. 752)."

The extent to which the trial court was violating the plaintiff's rights by substituting his own view of the facts for that of the jury was made plain by the opinion below,

for after paying formal obeisance to the jury the court said that he was setting the verdict aside because it was "against the weight of the evidence."

The trial court's view of the matter was "the compactor ram was openly and obviously a potentially, extremely dangerous piece of machinery." So is an automobile. By the trial court's reasoning, anybody who drove an automobile would be accepting the dangers of the patently dangerous device and guilty of contributory negligence as a matter of law and barred from recovery in the event the automobile malfunctions and causes him injury.

In examining plaintiff's conduct, one must realize that this compactor had several areas of operation, two of which were the hopper or storage compartment in which garbage was stored prior to falling into the compacting chamber and the compacting chamber itself where the ram would push garbage through the extrusion snout and out into the bag. So long as one's hands were in the hopper or storage compartment no dangers existed. Plaintiff was not injured because he stuck his hand into the ram compartment. He did not do that. He was injured because he was struck by a bottle and was caused to lose his equilibrium while attempting to clear bridging with a stick, with the result that he fell forward into the ram compartment. One should ask the question not whether it was contributory negligence to put one's hands into the moving parts of the machine but whether it was contributory negligence to be struck by a bottle. The trial court gets around this problem by finding that "the plaintiff was aware that bottles and other objects coming down the garbage chute could and did bounce off the deflection plate" (14a).

To analyze what this sort of statement amounts to one should return to the automobile analogy and ask the court to picture, if it will, an automobile that because of faulty

design would grind to a halt every two blocks, (or four blocks, or two miles) requiring its operator to step out of the car, open the hood, and jiggle the carburetor linkage to make it go again. Most motorists have done this very thing, from time to time, when through wear and tear an automobile carburetor has begun to malfunction. But now, when jiggling the carburetor linkage, a piece of something comes scooting out of the motor and hits the operator on the forehead, dazing him, causing him to lose his equilibrium and bringing his hand into contact with the fan. Would such a plaintiff be barred from recovery because the danger of opening the hood was open and obvious or guilty of contributory negligence, as a matter of law, when in the course of his job he tried to cope with such a defectively designed automobile.

But this is all that Felix Merced did. At no time did he voluntarily put his hand into moving parts. All he did was the equivalent of opening the automobile hood. A different case for contributory negligence, as a matter of law, might be made out if the proof was, as assumed by the defendant, that the plaintiff had reached down with his hand to the ram compartment and waited while the ram closed on it. This not being the case, we are left with a man who is placed in the dilemma of either abandoning the reasonable course of his work or assuming unavoidable risk. Such a man cannot be held guilty of contributory negligence as a matter of law.

The Court so held in *Kaplan* v. *48th Avenue Corp.*, 267 App. Div. 272:

> "One placed in the dilemma of abandoning the reasonable course of his work or assuming a risk will not be charged with contributory negligence as a matter of law if he adopts the latter alternative."

Merced testified that he was instructed to use that stick to break up bridges and to prevent jams and to keep

watching with the hopper door open to prevent jams when things like wood, carpets or other things came down. One who relies on the instructions of a superior may not be charged with contributory negligence as a matter of law. *Broderick* v. *Caldwell-Wingate,* 301 N.Y. 182.

The trial court, in ruling as it did, usurped the functions of the jury. First the trial court made factual findings on matters involving disputed evidence. It found, for example, that "blockages of garbage occasionally occurred." (15a) In fact, Melendez (262a, 263a) testified that the process was continuous, required continual use of the stick and Diaz admitted that it happened so often that if the machine was turned off each time it happened, a two hour job could not be completed in five (751a, 752a). The jury finding was that the occurrence was so "frequent" that the "machine could not function as automatic" (17a).

The trial court then drew the conclusion that Merced, "as a reasonably experienced porter at the apartment complex, was well aware of the dangers of putting any portion of his body through the door into the compacting chamber. The compactor ram was openly and obviously a potentially, extremely dangerous piece of machinery." (13a).

The court here completely ignores the fact that all of the porters were accustomed to reaching into the hopper with their sticks to break up blockages. The court further ignores the fact that the hopper chamber is different from the compacting chamber and that plaintiff repeatedly denied reaching into the compacting chamber. Plaintiff testified that while he was pushing at the garbage with a stick (471a, 506a), a piece of wood stuck. He reached for the wood which was on the ramp or sliding plate (472a). He was hit by a bottle (472a, 506a), garbage came down on him (506a) and his hand then went

down into the compacting chamber (506a). He denied reaching down into the compacting cylinder to take anything out of it (472a). The Court then concluded that "it seems beyond serious dispute not only that plaintiff was guilty of negligence or carelessness on his part but, perhaps more importantly, that he was not one for whom the dangers of usage amounted to a latent or concealed defect."

It seems strange that the court could conclude on March 31, 1975 that these matters were "beyond serious dispute" and that the jury's findings on these matters were not supported by the evidence when on February 13, 1975, in allocating as fact finder the degree of responsibility between the defendant Auto Pak and the third party defendant Southbridge Towers, he came to exactly the opposite conclusion. The court said at that time:

> "Under the circumstances, I think that the third party plaintiff, Auto Pak, has proved by a preponderance of the evidence that there was a failure to adequately warn and instruct Felix Merced in the use of this machine, or, more precisely, not the use as such, which I think Merced understood well enough, but the safety considerations in dealing with the machine, which was powered by a hydraulic motor. What might seem open and obvious to me may not have seemed so open and obvious to Felix Merced.
>
> I think that that duty of careful instruction on safety was probably breached in respect to him, and I surmise as a practical matter why it happened. He came home from Puerto Rico, he isn't the most engaging employee on the premises over there, I suspect, and he was given this building and nobody said much about it, they just assumed good old Felix would muddle through." (923a, 924a)

The standard under New York law is whether a reasonable man should have perceived both the condition and the dangers therefrom. *Bolm* v. *Triumph Corporation, supra.*

Of course, not everybody has the intelligence and perception of a Federal Court Judge, especially when the judge has the benefits of hindsight. Indeed, even if plaintiff had been aware of the bouncing bottle danger, it was clearly error for the trial court to have found him guilty of contributory negligence as a matter of law so long as the jury might have excused him on the ground of momentary forgetfulness. *Schneider* v. *Miecznikowski,* 16 App. Div. 177 (1962); see also, Frumer & Friedman Products Liability §7.02, n 5.2.

Perhaps the most outrageous fact finding the trial court made was its finding that plaintiff was aware that bottles and other objects coming down the garbage chute could and did bounce off the deflection plate. The only testimony along these lines was that on one occasion a broken barrel came down and cut his arm (473a). On this slim thread of evidence the trial court constructed, as a matter of law, an awareness on the part of plaintiff that a bottle could bounce off the deflection plate and hit him on the head.

The trial court in great detail instructed the jury that there was to be no liability imposed unless plaintiff exercised reasoned care for his own safety (846a-16).

The court further charged that there was no responsibility on the part of a manufacturer to guard against injury from a danger which is obvious or is discoverable by reasonable inspection or to supply safety devices to guard against such dangers which are easily ascertainable or discoverable (849a-14 to 17). The jury was further charged that there was no liability to be founded on the failure to employ safety devices where the danger

to be avoided is open and obvious (849a, 850a). The jury decided these issues against the defendant; the trial court had no legal right under the United States Constitution to overturn the jury's determinaion and substitute as the basis for decision its own view of the facts.

POINT III

The trial court erred in holding that there was no evidence to support the jury's finding that the machine was "defective" and "unfit for use for its ordinary purpose".

The trial court (15a) concluded that blockages were occasioned and held that there was no duty under New York law to incorporate "efficiency features" to prevent them. We have already reviewed the massive evidence supporting the conclusion that they were continuous or if intermittent, frequent. Mike Herman testified that if a porter didn't stand there with a stick to break up blockages the machine wouldn't operate (79a). He also testified that the garbage frequently stuck within the machine itself (82a) Diaz admitted that if they turned the machine off each time they had to clear a blockage they couldn't get the chute cleared in five hours (752a). Melendez testified that they had to stand and poke with the sticks continuously (262a, 263a).

In considering whether or not this mode of functioning amounted to a defect we should not ignore the testimony of Irving Deutsch, in which while he denied that there was any necessity for breaking up blockages in the machine, stated that if, indeed, it did work the way earlier witnesses had described, the customer "should get his money back." It is clear that a manufacturer is required to produce an article that will function properly for the purpose for which it is intended, *Frumer & Friedman Products Liability*, §7.01 [1]; *New York Pattern Jury*

Instructions 2:121. This machine did not function properly as intended. It was supposed to be automatic. It was not. The jury so found (17a).

In ruling as he did, the trial court utterly ignored the entire concept of liability for defective design, creating dangers to the user of a product. See *Frumer & Friedman Products Liability*, §7.01; *Noel*: *Manufacturer's negligence of design or directions for use of a product*, 71 Yale L.J. 816 (1962).

In *Bolm* v. *Triumph Corporation, supra,* liability for defective design was upheld where the alleged defect, a poorly placed luggage rack, did not impede the proper functioning of the product at all.

In *Beckhusen* v. *E. P. Lawson Co., supra,* liability was upheld for a design defect which by neutralizing the effectiveness of a safety device under certain circumstances made the operation of the machine more dangerous.

To suggest that a machine which was supposed to be automatic, but in practice was subject to such frequent jam-ups that a workman had to stand at the machine with a stick breaking up the jams as they occurred was not defective, particularly when defendant's own expert conceded that if the machine indeed worked that way the customer should have gotten his money back, is to return in the law of products liability to the days when there was no liability for defective design but only liability in the event that the product was not properly made in accordance with the design. The court tossed off the deficits in this machine as involving decreased efficiency. The expert testimony on behalf of the plaintiff was that generally accepted engineering principles required this machine to have a form of positive feed such as would be provided by rollers or a revolving screw to move the garbage along and that otherwise, given the set up of this

machine jam-ups would be inevitable. Plaintiff's expert further testified that because of the way the machine worked, it required both an interlock to turn it off automatically and a printed warning. Because the machine in the case at bar was so uniquely inefficient and idiotic in design, a case precisely on the facts which supports by precedent the view that New York law would regard this machine as a defective machine is not easy to come by. The closest we have been able to come in our research is *Tracy* v. *Finn Equipment Co.*, 310 Fed. 2d 436, in which the United States Court of Appeals for the Sixth Circuit, interpreting New York law, having fully in mind the limitations of responsibility as set forth in *Campo* v. *Scofield, supra,* and in *Inman* v. *Binghamton Housing Authority, supra,* upheld liability in a case where the plaintiff was injured while cleaning out mulching material from a machine which frequently became clogged with such material. The Court said:

> "The opinion of the expert was that simple measures could have been adopted to guard against or eliminate these hidden defects or dangers. They were: (1) An electric interlock on the clean-out door which would automatically stop the engine when the door was opened, (2) warnings in the instruction manual to turn off the engine before opening the clean-out door and (3) a warning decal on the face of the clean-out door. We have no right to disregard the testimony of plaintiff's expert witness. We think there was substantial evidence tending to prove negligence on the part of defendant."

POINT IV

The defendant's liability may also be based on its failure to give adequate instructions for use or to warn of the dangers involved in operating the machine.

The defendant was under a duty to warn of the danger attendant upon the use of this machine and to give proper instructions in its use. *Rosebrock* v. *General Electric Co.*, 236 N.Y. 227; *McLaughlin* v. *Mine Safety Appliance*, 11 N.Y.2d 162.

The liability of New York is very carefully set out in the Comment to PJI 2:135, New York Pattern Jury Instructions-Civil, Volume 1, Second Edition, as follows:

> "The duty to warn of dangers in the use of the product exists even though it is perfectly designed and made, G.C.P. Fire Relief Assn. v. Sonneborn Sons, supra; Rosebrock v. General Elec. Co., supra; Alfieri v. Cabot Corp., 17 AD2d 455, 460, 235 NYS 2d 753, affd 13 NY2d 1027, 245 NYS2d 600, 195 NE2d 310; DeVito v. United Airlines, 98 F Supp. 88. The manufacturer is under a duty to ascertain the nature of his product and is presumed to have superior knowledge of it, Noone v. Perlberg, Inc., 268 AD 149, 49 NYS2d 460, affd 294 NY 680, 60 NE2d 839. He is bound to keep reasonably abreast of scientific knowledge and advances in his field and is held to an expert's knowledge of its arts, materials and processes, Gielskie v. State of New York, 18 Misc 2d 508, 510, 191 NYS2d 436 revd on other grounds, 10 AD2d 471, 200 NYS2d 691, settled 11 AD2d 877, 205 NYS2d 1003, affd 9 NY2d 834, 216 NYS2d 85, 175 NE2d 455; Braun v. Roux Distributing Co. (Mo) 312 SW2d 758; see Cornbrooks v. Terminal Barber Shops, Inc., 282 NY 217,

> 26 NE2d 25; 2 Harper & James, Torts 1541, §28.4. Though no warning was required at the time of sale, if facts thereafter come to the manufacturer's attention indicative of defects in design or the necessity for warning, the manufacturer is under a duty either to remedy the defects or, if a complete remedy is not feasible, at least to give adequate warnings and instructions concerning the methods for minimizing the danger to purchasers of the product and not merely to the dealers through whom it was sold, Braniff Airways, Inc. v. Curtiss-Wright Corporation, 411 F2d 451 (CA2 NY); Comstock v. General Motors Corp., 358 Mich 163, 99 NW2d 627, 78 ALR2d 449."

In the case at bar, the defendant manufacturer of the product made no effort to discover the nature of its product and the way it worked. The designer of the product could not say what the volume of garbage coming down the chutes of the apartment buildings at which he tested the product was, (241a) other than it averaged out at something like twelve cubic yards a day (244a). Although he testified that he ran tests on these machines and made records of these tests (248a), no records ever were found (249a-253a). In any event, the designer could not say how much garbage the machine was disposing of in the course of an hour or in the course of a cycle (292a). He never tested out what would happen if pieces of wood were dropped down the chute (301a) or bottles (301a) or a big carton (302a). He never tested what would happen if the machine was allowed to remain off for any part of the day and garbage allowed to stack up in the chute (306a, 307a), although he heard that what would happen would be that everything that would be in the hopper would feed into the machine and extrude into the bags (307a). Although

Danziger from Universal Thermal had testified that he was well aware of the common problem referred to as "bridging" and that Clar also was well aware of it, Clar denied ever observing such a situation (307a). He insisted that he could not state how much garbage the machine would dispose of in an hour but that he had written it down in records (319a), records which never came to court. He did finally admit, however, that the purpose of the hopper door was to retrieve garbage from the hopper that was interfering with the processing. His example was a big box (321a). It is clear that Clar never complied with the law. Clar did not meet the requirements of the law that he ascertain the nature of his product and acquire superior knowledge of that product. *Wright* v. *Carter Products,* 244 F2d 53 (2nd Cir. 1957). As a result the customer was never told how to cope with bridging (99a), or that allowing the garbage to stack up in the chute would increase the tendency for the garbage to bridge in the compactor (100a) and although the normal procedure would be to leave the machine operating (199a), no such instructions were given to the men at Southbridge Towers (200a), although Auto Pak and Southbridge Towers both attempted to prove that the plaintiff had been instructed to turn off the machine before he opened the hopper door to break up jam-ups, the plaintiff's testimony was that he never received such instructions and that jam-ups were so frequent that he could not both turn off the machine each time he went to break up a jam-up and get his work done (509a, 510a, 517a).

Defendant breached its obligation to provide instructions and warning in two respects. One, admittedly it provided no instructions as to what to do about the problem of bridging and jam-ups but let its customers adopt their own remedies. This failure, in itself, is a breach

of duty giving rise to liability. Danziger's excuse for this was that: "The manufacturer wouldn't print the faults of the machine" (194a). Two, it failed to warn the plaintiff in writing or otherwise, to turn off the switch before opening the hopper door. Certainly if such a warning had been posted as a decal on the machine, plaintiff's employer could not have coerced that sort of behavior out of its porters. It was clearly the duty of the defendant to provide adequate instructions about what to do when the machine malfunctioned and adequate warnings about any dangers that might arise in coping with such malfunctions. *Beckhusen* v. *E. P. Lawson & Co., supra; Tracy* v. *Finn Equipment, supra; Wagner* v. *Larson,* 136 NW2d 312. The Court, in holding that such a warning would have been a "superfluity" (14a), was once again deciding questions of fact as though they were questions of law. It is plain that the question of whether the plaintiff should have realized without instruction or warning the proper method of coping with jam-ups in the machine, was one for the jury. We have discussed at great length, supra, the extent to which it was a jury question, where the dangers of putting your hand in the hopper compartment of the machine were or were not open or obvious. Notwithstanding that it is obvious that a product is a potential source of danger, a manufacturer is still under the obligation to provide specific warnings of specific risks when because of the complex technology involved in the machine, specific dangers may not be brought home to the user. *O'Connell* v. *Westinghouse X-ray Co.,* 288 NY 486, reversing 261 App. Div. 8; *Hopkins* v. *E.I. duPont de Nemours & Co.,* 199 Fed.2d 930, 933; *DeEugenio* v. *Allis Chalmers Manufacturing Co.,* 210 F.2d 409; *Wagner* v. *Larson, supra; Beckhusen* v. *E. P. Lawson & Co., supra.* In *O'Connell, supra,* the plaintiff, an experienced surgeon, received burns while performing operations on patients under the beam pro-

jected by an X-ray machine manufactured by the defendant. The defendant's representative who demonstrated the machine did not undertake to instruct the doctors on the techniques of using the machine for fluoroscopic operations with regard to distance and time of exposure. The court held that the finding of negligence on the part of the defendant was against the weight of the credible evidence and also that the plaintiff, in exposing his hand to the X-ray was, since he was a medical doctor presumably having knowledge of the dangerous effects of X-ray, guilty of contributory negligence, as a matter of law. 261 App.Div. 8. The Court of Appeals reversed on the grounds that:

> "questions of fact were presented for the determination of the jury in regard both to defendant's negligence and plaintiff's freedom from contributory negligence."

The Trial Court obviously held that the plaintiff was not entitled to instructions or warning for the same reason that it held that he was guilty of contributory negligence as a matter of law. The Trial Court's view was that the danger was so obvious that no warning was necessary. The *O'Connell* case, *supra,* makes plain as to both points, that these are questions of fact and not of law.

POINT V

The machine's defects were a proximate cause of the plaintiff's injury.

It is clear that if this machine had run automatically, the way it was supposed to, plaintiff would not have had his accident. It is also clear that if the hopper door had been equipped with an interlock, stopping the run-

ning of the machine so long as the door was open, plaintiff would not have had his accident. It was the way in which the machine worked, requiring an operator to stand there poking at the garbage, exposing himself to being hit by thrown garbage in the presence of the dangerous moving parts, that caused plaintiff's injury. But for these defects the accident would not have occurred. Proximate cause is "that which, in a natural and continuous sequence, unbroken by any new cause, produces that event [complained of], and without which that event would not have occurred," *Laidlaw* v. *Sage,* 158 NY 73, 99, 52 NE 679.

Of course, it is clear that there may be more than one proximate cause. *De Haen* v. *Rockwood Sprinkler Co.,* 258 NY 350, and all that is required is that the act or omission be the substantial factor in bringing about the injury. *Dunham* v. *Canisteo,* 303 NY 498.

Given the physical "but for" causation so apparent in this case, all that remains to be considered is the foreseeability of an accident as a result. It is not even the exact manner of the happening of the accident that must be foreseen. *Palsgraf* v. *L.I.R.R. Co.,* 248 NY 339, but only the possibility of harm. In the case at bar, the defendant, Auto Pak, knew that customers were having trouble with bridging and were employing sticks and bars to break up the bridging. Surely that presents notice enough of the possibility of harm that the defendant ought to have (1) taken steps to avoid bridging by designing a machine with positive feed, (2) made sure that when the hopper door was open to break up bridging, the machine was automatically turned off and (3) warned against leaving the machine on when breaking up bridging. Plaintiff's expert testified that these steps were required. That should be enough for the prima facie case. *Tracy* v. *Finn Equipment, supra.*

We think that causation is so clearly established that we would not bother to discuss it if the trial court had not, in an off-hand manner, without discussion or citation of authority, thrown out, in its opinion, the idea that these defects were not the proximate cause of plaintiff's injuries.

Even if one were to suggest that the conduct of Southbridge Towers in acquiescing in the malfunctioning of the compactor, issuing sticks to the porters to try to cope with this and failing to properly instruct the porters with regard to turning off the machine were intervening acts, still as the defendant was aware of the problems with the machine caused by bridging and the steps that customers had taken to cope with it, Southbridge Towers' actions were foreseeable and did not in any way break the chain of causation or relieve the defendant of responsibility. *McLaughlin* v. *Mine Safety Appliances Co.*, 11 NY2d 62, 226 NYS2d 407.

It is clear that where a new cause is set in operation by defendant's original wrongful conduct and not independent of it, defendant is not relieved of responsibility. *Milwaukee & St. Paul R.R. Co.* v. *Kellogg*, 94 US 469. The plaintiff was injured because he was forced to work at a dangerous and incompetently designed machine.

POINT VI

Trial court erred in ruling that the plaintiff, Modesta Merced, abandoned her case.

By direction of the Court, this case was tried, liability only. Since the claims of the plaintiff, Modesta Merced, were derivative and related only to matters of damages, no proof about Modesta Merced, the wife of the plain-

tiff, was produced at the trial since the trial was, by direction of the court, limited to questions of liability. It is only weeks after the trial, in the court's opinion, that anybody became aware that the court regarded this as an abandonment of Modesta Merced's claim. The court was plainly in error. In this limited, partial trial there was no cause to produce any proof with regard to the plaintiff, Modesta Merced's cause of action. The fact that no such proof was offered, therefore, cannot be construed as an abandonment of the action.

CONCLUSION

1. The judgment below should be reversed and the jury's verdict in favor of the plaintiff, Felix Merced, on the issue of liability reinstated.

2. The cause of action of Modesta Merced should be reinstated.

3. A trial on the issues of damages on behalf of both plaintiffs should be directed.

Respectfully submitted,

KATZ, SHANDELL, KATZ & ERASMOUS
and
MARIE M. LAMBERT
Attorneys for Plaintiffs-Appellants

RICHARD E. SHANDELL
Of Counsel

UNITED STATES COURT OF APPEALS, , FOR THE SECOND CIRCUIT

Affidavit of Service

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

MERCED & MERCED

VS.

AUTO PAK CO

defendan s-appellee

AFFIDAVIT OF SERVICE

E OF NEW YORK,
TY OF New York , ss:

Robert Ford being duly sworn,

ses and says that he is over the age of 21 years and resides at

That on the 14th

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E. Gellerman, Attorneyfor third -party defendant, Southbridge & Morris Duffy, Ivone
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three true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the
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onent is not a party to the action.

14th
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July, 1975
of .....19.....

Robert L. Ford

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4507705
Qualified in Delaware County
Commission Expires March 30, 1975